STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 20, 2014
v	No. 313692 Saginaw Circuit Court
PATRICK JERMAINE CALBERT, Defendant-Appellant.	LC No. 12-037135-FH

Before: RONAYNE KRAUSE, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Defendant, Patrick Jermaine Calbert, appeals as of right his convictions, following a jury trial, of felon in possession of a firearm (felon in possession),[1] resisting or obstructing a police officer,[2] carrying a concealed weapon,[3] possessing an open alcohol container in a motor vehicle (possessing an open container),[4] attempted murder,[5] and three counts of possessing a firearm during the commission of a felony (felony-firearm).[6] The trial court sentenced Calbert as a second-offense habitual offender[7] to serve 54 to 90 months' imprisonment for felon in possession, 2 to 3 years' imprisonment for resisting or obstructing a police officer, 54 to 90 months' imprisonment for carrying a concealed weapon, 90 days in jail for possessing an open container, 262 months' to 60 years' imprisonment for attempted murder, and two years' imprisonment for each felony-firearm conviction. We vacate Calbert's conviction and sentence for attempted murder and the corresponding felony-firearm conviction and sentence, affirm in all other respects, and remand for resentencing.

[1] MCL 750.224f.

[2] MCL 750.81d(1).

[3] MCL 750.227.

[4] MCL 257.624a(1).

[5] MCL 750.91.

[6] MCL 750.227b(1).

[7] MCL 769.10.

I. FACTS

A. PRELIMINARY EXAMINATION TESTIMONY

At Calbert's preliminary examination, Michigan State Police Trooper Ryan Rich testified that on March 3, 2012, at about 1:00 a.m., he decided to follow a vehicle that left a party store without fully stopping. While following the vehicle, Trooper Rich saw that its brake light was not fully functioning and, at one point, it drifted into another lane and then swerved back into the proper lane. Trooper Rich testified that he primarily decided to stop the vehicle because it swerved.

According to Trooper Rich, the vehicle was very slow to stop and Calbert was driving the vehicle. Calbert told him that he had arrived at his destination. Trooper Rich testified that his partner, Michigan State Police Trooper Kelly Lambert, was with him during the stop. Lambert told Trooper Rich that he saw an open container of alcohol under Calbert's center armrest. Trooper Rich testified that he asked Calbert to give him the bottle, and that Calbert responded by giving him the bottle. Trooper Rich testified that the bottle was open and contained alcohol.

Trooper Rich testified that he told Calbert to get out of his vehicle and that he then handcuffed Calbert. According to Trooper Rich, while he was searching Calbert, he saw Calbert reach for his right coat pocket and get one or two fingers into it. Trooper Rich searched Calbert's coat pocket and discovered a small, two-shot derringer handgun, which he put inside his patrol car on the left driver's seat. Trooper Rich testified that he put Calbert in the rear passenger seat, and that his vehicle did not have a partition between the front and rear seats.

According to Trooper Rich, he shut Calbert's door and one of the two people standing in a nearby driveway asked him whether they could keep Calbert's vehicle. After he responded to the question, he saw that Calbert was halfway between the front and rear seats of the vehicle. He opened Calbert's door and, seeing the handcuffs and some other silver metal behind Calbert's back, realized that Calbert had retrieved the gun from the driver's seat. He forced Calbert's handcuffs down to prevent him from being able to use the gun, and struck him in the neck to subdue him, at which point Calbert released the gun.

Trooper Rich testified that he told Calbert that he was going to jail for a long time because he believed that Calbert had grabbed the gun to kill him and Trooper Lambert and that Calbert responded that he only wanted to "take a look at" the gun.

B. PROCEDURAL HISTORY

On March 5, 2012, the prosecutor filed a complaint alleging that Calbert was guilty of (1) felon in possession, (2) felony-firearm predicated on felon in possession, (3) resisting or obstructing a police officer, (4) felony-firearm predicated on resisting or obstructing a police officer, and (5) carrying a concealed weapon. At the beginning of the preliminary examination on March 19, 2012, the prosecutor stated that he intended to add charges of (1) possessing an open container, and (2) attempted murder.

At the preliminary hearing, Trooper Rich testified about the events leading to Calbert's arrest. At the conclusion of the preliminary examination, the district court found probable cause

to believe that Calbert committed the five original charges, as well as the charge of possessing an open container. However, the district court found that there was not probable cause to support a charge of attempted murder.

On June 12, 2012, the prosecutor moved to amend the information to add charges of (1) attempted murder, and (2) felony-firearm predicated on attempted murder. Calbert responded that attempted murder was not an appropriate charge, in part because the alleged facts constituted assault with intent to commit murder rather than attempted murder. On August 22, 2012, the circuit court granted the prosecutor's motion to amend the information. The circuit court did not address Calbert's argument regarding assault with intent to commit murder.

C. TRIAL TESTIMONY

At trial, Trooper Rich testified consistently with his testimony at his preliminary hearing. Trooper Rich also testified that, after viewing Calbert's driver's license, he asked Calbert to get out of his vehicle because he was being arrested for possessing an open container. Calbert testified on his own behalf and denied that he had an open container in his vehicle or that he handed a bottle to Trooper Rich. Trooper Rich also testified that he believed that Calbert was nervous about something, and stated that he did not have any guns on him.

Trooper Rich testified that, after he discovered the gun, Calbert told him that the gun was a cigarette lighter. Trooper Rich testified that he was not familiar with how to operate or unload a derringer at that time, and placed it in his patrol vehicle. Trooper Rich testified that he also put Calbert in the vehicle and that, after briefly responding to a question from a bystander,

> my attention was drawn back to Mr. Calbert who was in the process of jumping into the front seat of our Tahoe to retrieve his firearm. . . . [H]is upper body was in the driver's seat of the Tahoe. His feet and legs were still in the backseat of our Tahoe, and he had started to come back towards the backseat, and when I looked down at his hands to see if he was able to get it or not, I could see the silver handcuffs, but I could see there was clearly more silver there than should be.

Trooper Rich testified that Calbert would have been able to shoot into the front seats even with his hands cuffed behind his back. At trial, Calbert testified that he did not try to grab the gun, and that the reason that Trooper Rich hit him was because he had lied about having a gun.

Trooper Rich testified that he believed that Calbert was going to try to use that weapon against either Trooper Lambert, myself or both of us[.]" Trooper Rich did not see whether Calbert had the gun pointed at him, but believed that Calbert intended to kill him or Trooper Lambert.

Trooper Lambert testified that he was searching the inside of Calbert's vehicle while Trooper Rich was securing Calbert and, while looking outside of Calbert's vehicle, he saw that Trooper Rich looked upset. Trooper Lambert testified that Trooper Rich told him that Calbert had tried to retrieve his gun. Trooper Lambert testified that he believed that Calbert tried to retrieve the gun so that he could shoot the troopers and try to escape. Trooper Lambert also demonstrated to the jury how a person can fire a gun with his or her hands cuffed behind the back.

Gregory Williams, Calbert's cousin, testified that he saw a police vehicle stop Calbert in front of his house. Williams testified that he saw a police officer strike Calbert, even though Calbert did not have anything in his hand. Williams testified that, some time later, he saw people photographing the scene in front of his house and overheard the prosecutor telling an officer how to respond to questions in court.

D. JURY INSTRUCTIONS

The trial court instructed the jury that, to find Calbert guilty of attempted murder, it must find that he intended to commit murder and that he took some action toward completing the crime that went beyond preparing to commit it. Defense counsel challenged another jury instruction, but not the trial court's attempted murder instruction. Defense counsel then stated that he had no additional comments or objections.

II. ATTEMPTED MURDER

A. AMENDMENT OF INFORMATION

1. STANDARD OF REVIEW

This Court reviews for an abuse of discretion the trial court's decision to grant or deny a motion to amend an information.[8] The trial court abuses its discretion when its outcome falls outside the principled range of outcomes.[9]

2. LEGAL STANDARDS FOR AMENDMENT OF INFORMATION

The function of a preliminary examination is "to determine whether a crime has been committed and, if so, whether there is probable cause to believe that the defendant committed it."[10] If the district court determines that the prosecutor has established probable cause that the defendant committed a crime, it binds the defendant over and the prosecution files an information in circuit court reflecting the alleged crimes.[11]

The information is not restricted to the charges in the prosecutor's original complaint, as long as the testimony at the preliminary examination supports the charges in the information.[12] The prosecutor may move to amend the information to add previously unidentified charges, and the circuit court should grant the motion unless amendment would result in "unacceptable

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[8] *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003).

[9] *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

[10] *People v Hunt*, 442 Mich 359, 362; 501 NW2d 151 (1993).

[11] *Id.*; MCL 766.13.

[12] *McGee*, 258 Mich App at 690-691.

prejudice to the defendant because of unfair surprise, inadequate notice, or insufficient opportunity to defend."[13]

3. LEGAL STANDARDS FOR ATTEMPTED MURDER

The attempted murder statute provides that

> [a]ny person who shall attempt to commit the crime of murder by poisoning, drowning, or strangling another person, or *by any means not constituting the crime of assault with intent to murder*, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any term of years.[14]

The elements of assault with intent to commit murder are "(1) an assault, (2) with the actual intent to kill, (3) which, if successful, would make the killing murder."[15]

When a defendant has tried to murder another person, the defendant has either committed an assault with the intent to commit murder, or committed an attempted murder.[16] The crimes of attempted murder and assault with intent to commit murder are mutually exclusive.[17] Importantly, attempted murder is the proper charge *only if* the defendant has not committed an assault.[18]

A person commits an assault by either (1) attempting to commit a battery, or (2) committing an unlawful act that places another person in reasonable apprehension of receiving an immediate battery.[19] A battery is "an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person."[20] "[W]hen one attempts an intentional, unconsented, and harmful or offensive touching of a

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[13] *Hunt*, 442 Mich at 364.

[14] MCL 750.91 (emphasis supplied).

[15] *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993).

[16] *People v Smith* (*On Rehearing*), 89 Mich App 478, 482-483; 280 NW2d 862 (1979).

[17] *People v Long*, 246 Mich App 582, 589; 633 NW2d 843 (2001).

[18] *Id*.; *Smith*, 89 Mich App at 483.

[19] *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005).

[20] *Id*. (quotation marks and citations omitted).

person, one has committed an assault."[21] When a defendant shoots or shoots at a victim, his or her conduct may support a conviction of assault with intent to commit murder.[22]

4. APPLYING THE STANDARDS

Calbert contends that the circuit court erred when it allowed the prosecutor to amend the information to add the charge of attempted murder because the alleged facts supported assault with intent to commit murder, not attempted murder. We agree.

Here, the prosecutor's theory of the case was that Calbert attempted to murder Troopers Rich and Lambert by obtaining a gun from the front seat of the patrol vehicle to shoot them. At the preliminary examination, Trooper Rich testified that he believed that Calbert intended to shoot him to attempt to escape custody, but that he subdued Calbert before Calbert had the opportunity to shoot him.

In other words, the facts at the preliminary examination supported that Calbert attempted to commit a battery by retrieving the gun in an effort to shoot one or both of the troopers. Attempting to commit a battery constitutes an assault and the charge of attempted murder is not appropriate if the defendant has committed an assault. Thus, the circuit court erred when it allowed the prosecutor to amend the information to add a charge of attempted murder.

We conclude that Calbert committed the first type of assault, an attempted battery. If Calbert's act of retrieving the gun was an act in furtherance of attempting to kill the officers with it, then it was an act in furtherance of committing a battery. Thus, it was an attempted battery, because a person cannot attempt to kill someone by shooting them without simultaneously attempting to batter them. We do not, and need not, address whether Calbert had the present ability to harm the officers. That consideration is only relevant to whether he placed the officers in a reasonable apprehension of immediate harm, which is in turn only relevant to whether he committed an apprehension-type assault.

B. SUFFICIENCY OF THE EVIDENCE

1. STANDARD OF REVIEW

This Court reviews de novo claims regarding the sufficiency of the evidence.[23] The evidence is sufficient to support a conviction if, viewing the evidence in the light most favorable

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[21] *Id*.

[22] See, e.g., *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005) (shooting victims at close range); *People v Plummer*, 229 Mich App 293, 305-306; 581 NW2d 753 (1998) (shooting at someone who is running away).

[23] *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

to the prosecution "any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt."[24]

2. LEGAL STANDARDS

An erroneous bindover is a harmless error if the prosecutor presents sufficient evidence from which a jury could convict the defendant at trial.[25] Again, the attempted murder statute provides that attempted murder is the "attempt to commit the crime of murder by poisoning, drowning, or strangling another person, or *by any means not constituting the crime of assault with intent to murder . . . .*"

3. APPLYING THE STANDARDS

We conclude that, on the basis of the facts at trial, no reasonable juror could conclude that Calbert attempted to commit a murder by a means *not* constituting an assault with intent to commit murder.

Here, the jury found Calbert guilty on the basis of the trial court's instruction that it could only do so if it concluded (1) that Calbert intended to murder the troopers, and (2) his actions did not merely constitute preparation. The facts at trial could only support the jury's conclusion if it found that Calbert intended to kill Troopers Rich and Lambert by shooting them. As described above, a shooting is a battery, and an attempted battery is an assault. Thus, an attempted shooting is an assault. Because Calbert committed an assault, the prosecutor could not prove the element of the attempted murder statute requiring that the accused did *not* commit an assault with intent to commit murder.

When a defendant's actions constituted an assault, he or she did not commit attempted murder under MCL 750.91.[26] Because a shooting constitutes the crime of assault with intent to commit murder, the prosecutor did not prove the essential element that the accused *not* commit an assault with intent to commit murder. Thus, we conclude that no rational trier of fact could have concluded that the prosecutor proved the elements of attempted murder beyond a reasonable doubt.

C. CALBERT'S REMAINING CONTENTIONS

Because we conclude that the evidence was not sufficient to support the elements of attempted murder, we decline to consider Calbert's arguments that (1) he did not have the sufficient specific intent to commit murder, (2) his actions constituted preparation rather than attempt, and (3) the trial court improperly instructed the jury on the elements of attempted murder.

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[24] *Id.*; *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

[25] *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010).

[26] See *Long*, 246 Mich App at 589; *Smith*, 89 Mich App at 483.

III. POSSESSING AN OPEN CONTAINER

A. STANDARD OF REVIEW

This Court reviews de novo claims regarding the sufficiency of the evidence.[27] The evidence is sufficient to support a conviction if, viewing the evidence in the light most favorable to the prosecution, "any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt."[28]

B. LEGAL STANDARDS

In relevant part, MCL 257.624a(1) provides that a person who is operating a vehicle shall not possess an open container of alcohol:

> [A] person who is an operator or occupant shall not transport or possess alcoholic liquor in a container that is open or uncapped or upon which the seal is broken within the passenger area of a vehicle upon a highway, . . .

C. APPLYING THE STANDARDS

Calbert contends that there is no evidence that the bottle in his car contained alcohol. We disagree.

Here, Trooper Rich testified that the troopers discovered an open bottle that contained Bacardi rum. Trooper Lambert later testified that he probably poured the rum out because that is standard protocol. When reviewing the sufficiency of the evidence, we will not interfere with the trier of fact's role to determine the credibility of the witnesses.[29] Viewing the evidence in the light most favorable to the prosecutor, a reasonable juror could conclude that the bottle contained an alcoholic beverage.

Further, Calbert does not support his assertion that a chemical analysis was necessary to prove that the container contained alcohol. Parties abandon issues on appeal if they "merely announce their position and leave it to this Court to discover and rationalize a basis for their claims."[30] We conclude that Calbert has abandoned this assertion.

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[27] *Hawkins*, 245 Mich App at 457.

[28] *Id.*; *Wolfe*, 440 Mich at 515.

[29] *Wolfe*, 440 Mich at 514-515; *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

[30] *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

IV. CALBERT'S ADDITIONAL ARGUMENTS

Calbert raises additional issues in his pro per supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4.

A. SUPPRESSION OF EVIDENCE

1. STANDARD OF REVIEW

This Court reviews de novo whether police conduct violated the Fourth Amendment and reviews de novo a trial court's decision on a motion to suppress.[31] This Court reviews for clear error the district court's findings of fact at a suppression hearing.[32] The trial court's factual findings are clearly erroneous if, after reviewing the record, we are definitely and firmly convinced that the trial court made a mistake.[33]

2. LEGAL STANDARDS

Both the United States and Michigan constitutions "guarantee the right of persons to be secure against unreasonable searches and seizures."[34] To comply with this requirement, police officers must have a warrant to conduct a search, or must be able to establish that their conduct was "within one of the narrow, specific exceptions to the warrant requirement."[35] If officers violate the Fourth Amendment while obtaining evidence, the evidence is not admissible as substantive evidence in a criminal proceeding.[36]

The plain-view exception allows a police officer to seize an item in his or her plain view if he or she views the item from a lawful position and the item's incriminating character is immediately apparent.[37] An item's incriminating character is immediately apparent if probable

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[31] *People v Hyde*, 285 Mich App 428, 438; 775 NW2d 833 (2009).

[32] *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999); *People v Chowdhury*, 285 Mich App 509, 514; 775 NW2d 845 (2009).

[33] *People v Everard*, 225 Mich App 455, 458; 571 NW2d 536 (1997).

[34] *People v Kazmierczak*, 461 Mich 411, 417; 605 NW2d 667 (2000). See US Const, Am IV; also see Const 1963, art 1, § 11.

[35] *People v Kazmierczak*, 461 Mich at 418.

[36] *Mapp v Ohio*, 367 US 643, 655; 81 S Ct 1684; 6 L Ed 2d 1081 (1961); *Kazmierczak*, 461 Mich at 418.

[37] *Harris v United States*, 390 US 234, 236; 88 S Ct 992' 19 L Ed 2d 1067 (1968); *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996).

cause would exist to seize the item without conducting a search.[38] Probable cause exists when there is "a probability or substantial chance of criminal activity."[39]

An arresting officer does not need a warrant to search a person incident to an arrest, "in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape."[40]

3. APPLYING THE STANDARDS

Calbert contends that his arrest was unlawful because he did not possess an open container of alcohol, and thus there was no contraband in plain view and no reason to arrest him. We disagree.

We reiterate that we will not interfere with the jury's role to determine the credibility of the witnesses.[41] Calbert testified that he did not possess any alcohol. But Trooper Lambert testified that he saw an open container of Bacardi rum in Calbert's center console and informed Trooper Rice about it. Trooper Rice thus had probable cause to believe that Calbert was committing the unlawful action of possessing an open container. Thus, Trooper Rice had probable cause to seize the item.

Trooper Rice testified that, once he had the container, he realized that it was a bottle of alcohol. At that point, Trooper Rice had probable cause to arrest Calbert for possessing an open container, and was entitled to search him incident to that arrest. Therefore, the trial court did not err by denying Calbert's motion to suppress the evidence of the gun.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

1. STANDARD OF REVIEW AND ISSUE PRESERVATION

A defendant must move the trial court for a new trial or evidentiary hearing to preserve the defendant's claim that his counsel was ineffective.[42] When the trial court has not conducted

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[38] *Champion*, 452 Mich at 102-103.

[39] *Id*. at 111 n 11; *Illinois v Gates*, 462 US 213, 243-244 n 13; 103 S Ct 2317; 76 L Ed 2d 527 (1983).

[40] *Chimel v California*, 395 US 752, 762-763; 89 S Ct 2034; 23 L Ed 2d 68 (1969).

[41] *Wolfe*, 440 Mich at 514-515; *Kanaan*, 278 Mich App at 619.

[42] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

a hearing to determine whether a defendant's counsel was ineffective, our review is limited to mistakes apparent from the record.[43]

2. LEGAL STANDARDS

A criminal defendant has the fundamental right to effective assistance of counsel.[44] To prove that his defense counsel was not effective, the defendant must show that (1) defense counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that counsel's deficient performance prejudiced the defendant.[45]

3. APPLYING THE STANDARDS

Calbert contends that he informed counsel of an additional witness who would discredit the officers' testimony weeks before trial, but counsel failed to call the witness. We conclude that the available record does not support Calbert's assertion.

On the third day of trial, defense counsel moved the trial court to allow it to call Jim Martin as a witness. Counsel stated that Martin sold the vehicle to Calbert and would testify that its brake lights were fully functional and that, when he retrieved the car from the impound lot, there was no liquor bottle inside the vehicle. The trial court denied defense counsel's request because it was untimely.

We must presume that counsel provided effective assistance.[46] The record is devoid of defense counsel's reason for waiting until the third day of trial to attempt to call Martin. If Calbert did not inform defense counsel of Martin's existence until the third day of trial, if Calbert did not provide defense counsel with sufficient information from which to contact Martin, or if Martin simply did not respond to defense counsel's inquiries until the third day of trial, defense counsel's attempt to call Martin as a witness on the third day of trial would not be unreasonable. Thus, we can only speculate about whether defense counsel's untimely decision to attempt to call Martin on the third day of trial was unreasonable Because we must presume that defense counsel provided effective assistance, we decline to engage in such speculation. Thus, the record is insufficient for us to conclude that defense counsel's actions fell below an objective standard of reasonableness.

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[43] *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003); *People v Gioglio (On Remand)*, 296 Mich App 12, 20; 815 NW2d 589 (2012).

[44] US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

[45] *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

[46] *Matuszak*, 263 Mich App at 58; *Unger*, 278 Mich App at 242.

C. JUDICIAL QUESTIONING

1. STANDARD OF REVIEW AND ISSUE PRESERVATION

To preserve a challenge to prejudicial conduct by a trial judge, a defendant must object at trial.[47] Calbert did not challenge the trial judge's conduct below. Therefore, we will review this issue for plain error affecting Calbert's substantial rights.[48]

2. LEGAL STANDARDS

A trial judge may question witnesses.[49] However, a defendant is entitled to a "neutral and detached magistrate."[50] The trial judge should take care to ensure that his or her questions "are not intimidating, argumentative, prejudicial, unfair, or partial."[51] A trial judge's questions are prejudicial when they (1) create suspicion concerning the witness's credibility and (2) possibly influenced the jury to the defendant's detriment.[52]

3. APPLYING THE STANDARDS

Calbert contends that the trial judge's questions to Trooper Rich unduly influenced the jury. We disagree.

Here, Calbert challenges the following questions that the trial judge asked Trooper Rich:

> *Q.* And the rest [sic] was in part for open intox in a vehicle, correct?
>
> *A.* Yes, sir.
>
> * * *
>
> *Q.* All right. What happened to the bottle, do you know that?
>
> *A.* Most likely we poured out the contents and returned the bottle to the vehicle.
>
> *Q.* Okay. Is that what's done on similar stops with open intox?

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[47] *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996).

[48] See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[49] MRE 614(b).

[50] *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996) (internal quotation marks and citation omitted).

[51] *Cheeks*, 216 Mich App at 480.

[52] *Id*.

A. Yes, sir.

We conclude that these questions were not prejudicial. The trial judge phrased the questions neutrally, and the questions clarified the basis for Calbert's arrest. Further, the questions were cumulative to Trooper Lambert's testimony. Thus, the questions neither created a suspicion concerning Trooper Rich's credibility nor did they possibly influence the jury.

V. CONCLUSION

Because the circuit court improperly allowed the prosecutor to amend the information to include a charge of attempted murder under MCL 750.91 and the prosecutor did not prove all the elements of attempted murder at trial, we vacate Calbert's attempted murder conviction, and the corresponding felony-firearm conviction, and remand for resentencing. We affirm in all other respects.

We affirm in part, vacate in part, and remand. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck